UNITED STATES 0F AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 542230
Issued to: Alfred E. AILSWORTH

DECISION OF THE VICE COMMANDANT ON APPEAL
2532

This appeal has been taken in accordance with 46 U.S.C. #7702 and 46 C.F.R. #5.701.

By a decision dated 22 January 1990, an order dated 8 February 1990 and an errata order dated 15 February 1990, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's Merchant Mariner's License and any other valid documents and certificates outright for twelve months, having found proved the charges of negligence and misconduct.

The single specification supporting the finding of proved to the charge of negligence alleged that, on or about 7 July 1989, Appellant, while serving under the authority of his license as operator of the towing vessel M/V MILDRED A., failed to adequately control the movements of the M/V MILDRED A. and its tow, resulting in an allision with a pier.

The specification supporting the finding of proved to the charge of misconduct alleged that, on or about 7 July 1989, under the authority of his license, Appellant operated the M/V MILDRED A. without being familiar with the vessel's characteristics as required in 46 C.F.R. #15.405. A second specification to the charge of misconduct was dismissed by the Administrative Law Judge.

The hearing was held at Norfolk, Virginia on 7 December 1989 and 6 February 1990. The Investigating Officer introduced eight exhibits into evidence and introduced the testimony of three witnesses. Appellant was represented by professional counsel and introduced three exhibits and testified under oath in his own behalf. Appellant entered a response of "deny" to the charges and specifications as provided in 46 C.F.R. 5.527.

The Administrative Law Judge's written decision was entered on 22 January 1990 and the written order suspending Appellant's Merchant Mariner's Document was entered on 8 February 1990, supplemented by an errata order dated 15 February 1990, correcting minor clerical errors. Appellant filed a notice of appeal on 7 February 19gO. Upon request, Appellant received the transcript on 29 June 1991 and filed his appellate brief on 29 August 1991. Accordingly, this matter is properly before the Vice Commandant for review.

It is noted that on 7 February 1990, concomitant with his notice of appeal, Appellant filed a request for the issuance of a temporary license. This request was denied by the Administrative Law Judge. However, on appeal, the Vice Commandant vacated the

order denying issuance of the temporary license and instructed the Administrative Law Judge to issue a temporary license in accordance with applicable regulations. See, Vice Commandant Decision on Appeal 2499 (AILSWORTH) issued 3 May 1990.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of and serving under the authority of Merchant Mariner's License Number 542230 issued to him by the United States Coast Guard.

On 7 July 1989, Appellant was serving as the operator of the M/V MILDRED A., pushing the empty barge SL-7809 en route to the Southern States Grain Pier on Urbanna Creek from Hampton Roads, Virginia.

The towing vessel M/V MILDRED A. displaces 143 gross tons, is 79 feet in length and is powered by a 900 HP diesel engine. The engine is equipped with an overspeed trip mechanism which shuts down the engine at 900 RPM. The vessel is owned by Sea-Land Transport, which is solely owned by Appellant. Appellant's company purchased the vessel in 1982. Except for a period of 1.5 years, the vessel has been operated by Appellant himself.

The M/V MILDRED A. and tow entered the creek from the Rappahannock River at approximately 1400. Appellant was at the helm with the mate and a deckhand near the bow of the barge. The mate employed a portable radio to communicate with Appellant. The weather was clear, the winds were light and variable.

Urbanna Creek is located on the southern bank of the Rappahannock River. A jetty marks the opening of the creek and

the creek bends to the left approximately 1/4 mile from the mouth. A channel marker indicates the deep water. There are also fixed lighted markers in the area and the channel depth is 10-11 feet. Jamison Cove Marina is located approximately 1.5 miles from the entrance jetty.

As the flotilla approached the entrance jetty at six knots, it encountered a sailboat and reduced speed to two knots. Upon entering the creek, Appellant gave the engines a burst of power to move the tow around the bend. As the flotilla swung around to port, the marina was off the vessel's starboard bow. The mate informed Appellant by radio that the flotilla was getting closer to the marina.

Appellant applied full astern power to the engine to keep the tow from alliding with the marina piers. As this was done, the engine revved past 900 RPM and shut down, causing the flotilla to drift into the marina piers and moored pleasure boats. The piers and a number of pleasure boats were damaged. There were no injuries and no pollution.

BASES OF APPEAL

Appellant asserts the following three bases of appeal from the decision of the Administrative Law Judge:

1. Title 46 C.F.R. #15.405 does not require licensed tug operators to conduct thorough examinations of vessel machinery before use; nor does it create a duty for which a breach may give rise to suspension and revocation proceedings;

2. The finding of proved to the charge of negligence is in error because Appellant has overcome the presumption of fault regarding the charge of negligence by proving the existence of an unforeseeable danger that proximately caused his loss of control over the vessel;

3. The order of a twelve month suspension is excessive based on Appellant's exemplary record.

OPINION

I

At the hearing, Appellant was found to have violated 46 C.F.R. #15.405 by failing to familiarize himself with the relevant characteristics of the vessel, to wit the overspeed trip of the main propulsion machinery. Appellant asserts that the finding of proved is in error because the regulation does not set forth a requirement that the vessel operator conduct a thorough examination of vessel machinery before use. I do not agree.

Title 46 C.F.R. #15.405 states:

> Each licensed, registered, or certificated individual must become familiar with the relevant characteristics of the vessel on which engaged prior to assuming his or her duties. As appropriate, these include but are not limited to: general arrangement of the vessel; maneuvering characteristics; proper operation of the installed navigation equipment; stability and loading characteristics; emergency duties; and main propulsion and auxiliary machinery, including steering gear systems and controls.

Appellant asserts that there is no duly established rule requiring tug operators to be thoroughly familiar with the propulsion machinery of their vessels. He further asserts that the regulation, supra, requires only general familiarity.

In this case, an overspeed trip mechanism completely shuts down the diesel engine when the engine revs in excess of 900 RPM. This mechanism is an integral and critical element of the M/V MILDRED A.'s main propulsion machinery. Significantly, this overspeed trip mechanism is operable at times when propulsion and control are most crucial, for instance, when employing maximum speed/RPM's to avoid a hazard, when overtaking another vessel, or when maneuvering a tow in a critical situation. Accordingly, this mechanism is certainly a "relevant characteristic" of the vessel's main propulsion equipment. Clearly, a characteristic of this significance is included in the plain language of the abovecited regulation.

The master/operator of a vessel is required to know the operating characteristics of his particular vessel. Appeal Decisions 2302 (FRAPPIER); 2272 (PITTS). 2478 (DUPRE) It is reasonable to expect Appellant to have known of the overspeed trip mechanism through the exercise of a diligent inspection and/or sea trial when the vessel was purchased. It is incumbent on the operator to make a reasonable effort to discover hazards on his vessel. APPeal Decisions 2367 (SPENCER); 2308 (GRAY); 2478 (DUPRE). This includes peculiar machinery or mechanisms, such as an overspeed trip, which could gravely affect the propulsion or maneuvering capabilities and in turn hazard the vessel.

Appellant argues, inter alia, that it was error to charge Appellant's violation of 46 C.F.R. #15.405 as misconduct because there is no statute that specifically defines such a violation as misconduct. I disagree.

Title 46 U.S.C. #7701(d) specifically authorizes the Secretary to prescribe regulations to carry out suspension and revocation proceedings. Title 46 U.S.C. #7703 authorizes the Secretary to suspend or revoke a Merchant Mariner's License or Document if a regulation prescribed under statute was violated or if the mariner has committed an act of misconduct. The Secretary has delegated the authority in the aforementioned statutes to the Commandant in 49 C.F.R. #1.46. Acting through that delegation, the Commandant, in 46 C.F.R. #5.27 has defined misconduct to include the violation of promulgated regulations.

Accordingly, both the charge of misconduct and the implementing regulation defining misconduct are soundly based on statutory provisions explicitly authorizing suspension or revocation for such conduct.

II

Appellant asserts that he has overcome the presumption of fault regarding the charge of negligence. Appellant urges that he proved the existence of an unforeseeable danger (overspeed trip mechanism). Accordingly, he asserts that the finding of proved to the charge of negligence was in error. I do not agree.

The guiding precedent regarding the issue of presumption is Commandant v. Murphy. NTSB Order No. EM-139 (February 3, 1987) and Order Denying Reconsideration NTSB Order No. EM-144 (July 21, 1987). See also. Appeal Decisions 2524 (TAYLOR); 2500 (SUBCLEFF); 2501 (HAWKER); 2492 (RATH); 1200 (RICHARDS).

In Murphy, supra, the following criterion was pronounced in determining whether the presumption of negligence has been rebutted:

> Since the ultimate burden of proof on its charge against a seaman remains continuously with the Coast Guard notwithstanding any presumption of negligence, a credible, nonfault explanation for a collision defeats the presumption and obligates the Coast Guard to go forward with evidence to counter the seaman's explanation or to show that he was nevertheless guilty of some specific act of negligence.

Accordingly, it is incumbent on Appellant to establish a "credible, non-fault explanation" for the allision with the piers and pleasure boats other than his own actions or inactions. The record fails to support Appellant's assertion that he has established this explanation.

Contrary to Appellant's assertion, the operation of the overspeed trip and subsequent consequences were not unforeseen circumstances that unexpectedly precipitated the allision. In fact, Appellant's own testimony reflects that perhaps he did know of the existence of the overspeed trip but thought it became operational at an RPM level other than 900 RPM. [TR 247; See also, Decision of Administrative Law Judge of 22 Jan 90 at 14].

It was incumbent on Appellant, as the vessel operator, to know the operational characteristics and consequences of the operation of the overspeed trip mechanism. Such knowledge is encompassed within the standard of care for vessel operators.

> Appellant is responsible for knowing how the towboat with its tow can cope with any particular set of navigational conditions considering its horsepower, handling . . . and the size and configuration of the tow. . . Appeal Decision 2367 (SPENCER)

As the exclusive owner and operator of the M/V MILDRED A., Appellant had the opportunity and the obligation to test the propulsion limits and peculiarities of the vessel. I concur with the opinion of the Administrative Law Judge that "[Captain Ailsworth] had ample opportunity to test the engine and thus uncover the exact functioning of the overspeed trip . . . running the tug's engine at sufficient RPM's to test its characteristics at full power . . . can be accomplished from the wheelhouse with reasonable effort." [Decision of Administrative Law Judge of 22 Jan 90 at 15].

III

Appellant asserts that the order of twelve months outright suspension is excessive and unfair. I do not agree.

Orders imposed by the Administrative Law Judge are exclusively within his discretion unless obviously excessive or an abuse of discretion. Appeal Decisions 2524 (TAYLOR); 2445 (MATHISON); 2422 (GIBBONS); 2391 (STUMES). In this case, the record reflects no abuse of discretion by the Administrative Law Judge.

Title 46 C.F.R. #5.569(b)(2) specifically permits the Administrative Law Judge to take into consideration the prior record of the Appellant. In this case, the record reflects that Appellant's license had been suspended for four months in 1982 on the basis of a finding of proved to the charge of misconduct, supported by six specifications. [ALJ Exhibit II; Order of Administrative Law Judge of 8 Feb 90 at 2].

The Administrative Law Judge clearly and succinctly details his reasons for issuing a twelve month outright suspension in his order. [Order of Administrative Law Judge of 8 Feb 90, at 3-4]. The rationale expressed by the Administrative Law Judge is well founded and supported by the record. Contrary to Appellant's assertion, I find no indication that the Administrative Law Judge was unfair or acted in an arbitrary or capricious manner.

Appellant is correct that the Administrative Law Judge did directly address Appellant at the hearing regarding Appellant's inattention to regulations and past record. [TR 360-362]. This was neither prejudicial nor inappropriate and was done within the context of advising Appellant regarding the Administrative Law Judge's rationale for issuing the twelve month outright suspension. Contrary to Appellant, I find nothing in the Administrative Law Judge's statements that reflect impartiality, unfairness or bias.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The Decision of the Administrative Law Judge dated 22 January 1990 is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 2nd day of December, 1991.